83-1056

No. 83-

IN THE

Supreme Court of the United States

October Term, 1983

GENERAL MOTORS CORPORATION,
Petitioner,

v.

OKLAHOMA COUNTY BOARD
OF EQUALIZATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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QUESTION PRESENTED

Whether, under the Contract, Due Process and Taking Clauses, a state may impair its own obligations under a financial contract, which has been fully and irrevocably performed by the other party to the contract, through a retroactive application of an unforeshadowed state Attorney General's opinion and state court decision.

PARTIES INVOLVED

The petitioner herein, plaintiff-appellant below, is General Motors Corporation, a publicly held company.* An additional plaintiff in the District Court of Oklahoma County was the Oklahoma Industries Authority, an agency of the State of Oklahoma.

Defendants-appellees below were the Oklahoma County Board of Equalization, George Keyes, County Assessor of Oklahoma County, and Joe B. Barnes, County Treasurer of Oklahoma County. Defendant-intervenor, appellee below, was Jan Eric Cartwright, Attorney General of the State of Oklahoma.

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* All of petitioner's United States and Canadian subsidiaries are wholly owned except Motor Enterprises, Inc. which is owned in part by the United States Small Business Administration.

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Oklahoma entered in these proceedings on May 17, 1983, as amended on July 26, 1983, and October 4, 1983.

OPINIONS BELOW

The opinion of the Supreme Court of Oklahoma is in three parts. The first order and opinion is reported unofficially at 54 Okla. B.J. 1351, and is reproduced in the Appendix hereto, at pp. A1-A8. A second order granting rehearing and amending the court's opinion is reported at 54 Okla. B.J. 2068, and is reproduced in the Appendix at pp. A9-A12. A supplemental opinion on rehearing and order denying further rehearing are reported at 54 Okla. B.J. 2564, and are reproduced in the Appendix A at pp. A13-A20 and A25.

The opinion of the trial court is unreported, and is reproduced in the Appendix at pp. A21-A23. The opinion of the Oklahoma County Board of Equalization is unreported and is reproduced in the Appendix at p. A24.

JURISDICTION

The final order of the Supreme Court of Oklahoma denying further rehearing in this case was entered on October 4, 1983, and is reproduced in the Appendix at p. A25. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 10, Clause 1, of the United States Constitution provides, in part:

> No State shall . . . pass any . . . Law impairing the Obligations of Contracts. . .

Amendment V of the United Sates Constitution provides, in part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1, of the United States Constitution provides, in part:

> No State shall . . . deprive any person of . . . property, without due process of law. . . .

STATEMENT

In 1976, petitioner was considering a number of sites for the location of a major new automobile assembly plant. After narrowing its choice to sites in three different states, including Oklahoma, petitioner held intensive discussions with officials in each of those states. Oklahoma, which was then concerned with high unemployment and noncompetitive wage scales, aggressively sought to induce petitioner to locate its new plant in Oklahoma. Other states had already offered petitioner abatement of property

taxes on the new plant as an inducement to locate the plant in their states. Petitioner advised Oklahoma that petitioner's plant would not be located in Oklahoma unless Oklahoma provided a tax abatement competitive with other states under consideration.

In early 1977, petitioner and the State of Oklahoma agreed that petitioner would build and operate its new automobile assembly plant in Oklahoma City and, in return, Oklahoma would exempt the plant from *ad valorem* property taxes for twenty years. Under the agreement, petitioner would provide all but $1 million of the $288 million required to build the plant. A state agency, the Oklahoma Industries Authority (OIA),[1] would provide $1 million in bond financing for the plant. The OIA would hold legal title to the plant in order to qualify the plant for tax exemption under Article 10, § 6, of the Oklahoma Constitution, which provides that,

> all property of the United States, and of this State, and of counties and of municipalities of this State . . . shall be exempt from taxation. . . .

The OIA would lease the plant to petitioner for twenty years. After twenty years, petitioner would buy the plant from the OIA for a nominal sum.

In entering into and performing its contract with Oklahoma, petitioner relied upon twenty-five years of Oklahoma practice and legal precedent and upon assurances offered by the state's highest officials concerning the tax abatement. On October 4, 1976, petitioner met with the Attorney General, a representative of the Governor, two of the three members of the Oklahoma Tax Com-

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[1] The OIA is a public trust established under Oklahoma's Trusts for the Furtherance of Public Functions Act ("Public Trusts Act"), 60 Okla. Stat. §§ 176, *et seq.* The Public Trusts Act was enacted in 1951 to encourage new economic development in Oklahoma.

mission, and the Legal Counsel and Assistant General Manager of the OIA. At that meeting, all of these officials assured petitioner that, under Oklahoma law, the plant was, and would continue to be, exempt from Oklahoma taxes as long as title to the plant was held by the OIA.

These assurances were backed up by legal precedents and twenty-five years of uniform practice and understanding concerning the operation and legal effect of leases with state agencies pursuant to the Public Trusts Act.[2] In 1969, eight years before petitioner entered into its contract with Oklahoma, Hon. G. T. Blankenship, the Attorney General of Oklahoma, issued an official opinion advising that properties were tax exempt if a public trust held legal title:

> Assuming that the Oklahoma Industrial [sic] Authority has been in all respects created in strict accordance with 60 O.S. 1961, Sections 176 and 177; that the title to the project will vest in the Authority; and that the beneficial interest in the trust estate has been acquired on behalf of Oklahoma County, it is the opinion of the Attorney General . . . that no part of any property owned by the Authority will be, under the existing law, subject to ad valorem taxation by the State of Oklahoma, County of Oklahoma, Oklahoma City, or any other agency or instrumentality of the State of Oklahoma.

Okla. Attorney General Opinion No. 69-156. In Oklahoma, unlike most other states, opinions of the Attorney General are binding, not merely advisory. They "prescribe substantive law" and they have "general applicability." *Grand*

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[2] Between 1951, when the Public Trusts Act was adopted, and 1979, more than 340 industries and businesses came into or expanded their activities in Oklahoma through public trust financing. Inventory of Tax Exempt Industries in Commercial Real Property, Oklahoma Tax Commission, July 2, 1979.

River Dam Authority v. State, 645 P.2d 1011, 1014-1015 (Okla. 1982).

In October 1976, petitioner requested from a successor Oklahoma Attorney General a letter opinion stating that official Attorney General Opinion No. 69-156 as it would apply to the new plant remained the law of Oklahoma. In his letter to petitioner of October 5, 1976, Attorney General Larry Derryberry wrote:

> I have reviewed said opinion and find the conclusion reached to be a correct analysis of the law in Oklahoma. Since the date of issue of said opinion, I have found no case decisions or legislation that would alter the conclusion reached therein.
>
> Accordingly, it is my opinion that the state of the law expressed in Opinion No. 69-156 is still in force and effect.

Letter of Attorney General Derryberry, October 5, 1976, App. at p. A-26.

By 1976, although the Oklahoma Supreme Court had not ruled squarely on the question of the validity of tax arrangements such as the one petitioner later entered into, it had issued a number of decisions which supported their validity. In *Sublett v. City of Tulsa*, 405 P.2d 185 (1965), the Oklahoma court held:

> Where the Constitution and State law exempt all property of municipal corporations within the State from taxation, such property is exempt therefrom without regard to the character of the use, and the fact that certain property may be used by private corporations does not abrogate Const., Art. X, Sec. 5.

405 P.2d at 188. *See also Board of County Commissioners v. Warram*, 285 P.2d 1034, 1035 (Okla. 1955) ("Trusts with one or more governmental entities as beneficiary are

exempt from all forms of taxation in Oklahoma"); *State ex. rel. City of Tulsa v. Mayes*, 174 Okla. 286, 51 P.2d 266 (1935).

After entering into its agreement with Oklahoma, petitioner proceeded to construct the plant.[3] Legal title to the plant was vested in the OIA and petitioner entered into a twenty-year lease with the OIA. The lease agreement between petitioner and the OIA stated:

> The parties recognize that as the Lessor is an agency of the State of Oklahoma, the Project here demised is not subject to ad valorem taxation under the Constitution and laws of the State of Oklahoma. . . .

Lease Agreement, ¶ 13(d), April 1, 1978, App. pp. A27-A28.

The first hint that the plant might not be exempt from Oklahoma taxes came on July 31, 1979, three months *after* construction of the plant and petitioner's performance under the agreement were completed. A newly elected Attorney General issued an opinion withdrawing Attorney General Opinion No. 69-156 and ruling that public trust properties were taxable. Okla. Attorney General Opinion No. 79-168. Based on this new opinion, respondent County Assessor of Oklahoma County sent to petitioner on January 20, 1980, a notice changing the assessed valuation of the plant from zero in 1979 to the full value of the plant in 1980 with a resultant tax liability in excess of three million dollars per year. Shortly thereafter, in a test case drawn from a large number of cases filed in the wake of the Attorney General's opinion, the Oklahoma Supreme Court,

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[3] The plant comprises approximately 70 acres under roof and was, at the time of its completion, the largest such facility in the United States. Petitioner presently employs more than 5,000 persons at the plant.

in *State ex rel. Cartwright v. Dunbar*, 618 P.2d 900 (Okla. 1980), held that public trust properties were taxable, but on different grounds from those cited in Attorney General Opinion No. 79-168. The result in *Dunbar* was based on the court's conclusion that the industrial lessee, not the State agency which holds legal title, is the owner of public trust property and, hence, such property is not "property of the . . . State" within the meaning of the tax exemption provision of Article 10, § 6, of the Oklahoma Constitution.

The court's conclusion in this regard was completely unanticipated at the time the agreement between petitioner and Oklahoma was entered into. Indeed, in *Dunbar*, the court stated that "the Legislature was of the view that public trust property was constitutionally exempt from taxation" and the "first notice" to the contrary "was the July 31, 1979 opinion of the Attorney General." 618 P.2d at 913. Until that time, Oklahoma officials were bound by the 1969 opinion of the Attorney General. In Oklahoma, "it is the duty of public officers . . . to follow the opinion of the Attorney General until relieved of such duty by a court of competent jurisdiction or until this Court should hold otherwise." *Id.*

Based on Attorney General Opinion No. 79-168 and the decision of the Oklahoma Supreme Court in *Dunbar*, respondent Oklahoma County Board of Equalization denied petitioner's protest. Appendix at p. A24. Petitioner, along with the OIA, commenced this action by filing a Petition with the District Court of Oklahoma County. Petitioner and the OIA alleged, *inter alia*, that the assessment of taxes on the plant would violate the Contract Clause of the United States Constitution by impairing the obligation of petitioner's tax abatement agreement with the State of Oklahoma, and would violate the Due Process Clause of the Fourteenth Amendment by taking petitioner's

property without due process of law and without just compensation.[4]

In granting summary judgment for respondents, the Oklahoma trial court upheld the ruling of the Board of Equalization denying petitioner's protest. The court held that, under *Dunbar*, the plant was taxable and the agreement between petitioner and the State of Oklahoma was "void and contrary to law," Appendix at p. A-22. The trial court did not address the federal constitutional issues presented by petitioner and the OIA.

On appeal to the Oklahoma Supreme Court, petitioner again argued that, under the Contract and Due Process Clauses, the State of Oklahoma could not apply new rules of law retroactively to render unforceable petitioner's tax exemption contract, which had been entered into and fully performed by petitioner prior to any notice that such agreement was invalid. Appendix pp. A4-A5.

In reaching its decision, the Oklahoma Supreme Court assumed that petitioner and the State did in fact enter into a contract pursuant to which the Oklahoma City plant was to be exempt from property taxes for twenty years. Slip Op., May 17, 1983, at 6; Appendix at p. A7. The court below also expressly assumed that, in entering into that contract, petitioner and state officials did in fact rely upon the then established principle that such contracts were valid under Article 10, § 6, of the Oklahoma Consti-

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[4] In compliance with Rule 21.1(h), the pertinent allegations of the Petition filed with the trial court in which the federal questions were raised are reproduced in the Appendix hereto, at pp. A29-A31 and are summarized in the accompanying text. Petitioner's arguments to the Oklahoma Supreme Court respecting the federal questions are summarized in that Court's opinion of May 17, 1983 (Appendix pp. A4-A5) and at p. 8 above. The disposition of the federal questions by the trial court and the Supreme Court of Oklahoma are summarized in the accompanying text at pp. 8-9 and are found in the opinions of those courts reproduced at Appendix pp. A1-A23.

tution, as set out in Oklahoma Attorney General Opinion No. 69-156. *Id.* Nevertheless, the Oklahoma Supreme Court upheld the trial court and refused to enforce the State's obligation under its contract with petitioner. The Oklahoma court held that the Contract Clause does not protect contracts which are invalid or illegal, relying heavily on discredited language from this Court's decision in *Norton v. Shelby County,* 118 U.S. 425, 442 (1886), to the effect that "[a]n unconstitutional statute confers no rights, creates no liability, and affords no protection." *Id.* The court below further held that petitioner could not rely on the assumed authority of Oklahoma officials or even of the state legislature. Slip Op., May 17, 1983, at 7; Appendix at p. A8. On rehearing, the court indicated that petitioner should have filed an application for a declaratory judgment instead of relying on Oklahoma officials. Supplemental Opinion on Rehearing, October 4, 1983, at 4; Appendix at pp. A16-A17.

REASONS FOR GRANTING THE WRIT

If, in the factual circumstances presented here, the Oklahoma legislature had passed a statute retroactively declaring petitioner's tax abatement contract void and forbidding state officers to perform the contract, there would be no doubt that the state had violated the Contract and Due Process Clauses of the United States Constitution. *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234 (1978); *United States Trust Co. of New York v. New Jersey,* 431 U.S. 1 (1977); *Nichols v. Coolidge,* 274 U.S. 531 (1927). The important federal question presented by this case is whether the same state action, when effected by retroactive executive and judicial rulemaking, is also subject to federal constitutional scrutiny. The preponderance of this Court's past decisions, including its most recent opinions, support an affirmative answer and a judgment vindicating petitioner's contract rights. However, there

are several inconsistent authorities which can be cited to the contrary and which indicate that this important question should now be settled by this Court.

I. Decisions Of This Court Support The Proposition That The Contract, Due Process, And Taking Clauses Limit The Circumstances In Which A State May, By Retroactive Executive Or Judicial Action, Impair Its Own Obligation Under A Financial Contract.

A. Decisions Directly Addressing Changes of Law By State Courts

While no recent majority opinion of the Court has squarely addressed the question presented here, earlier rulings establish that the Contract, Due Process, and Taking Clauses proscribe the result reached by the court below. In addition, Justice Stewart addressed the question persuasively in a 1967 concurring opinion which bears directly on this case.

In *Gelpcke v. City of Dubuque*, 1 Wall. 175 (1863), a case involving the validity of city bonds, this Court held that

> "The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law." [*quoting* Ohio Life & Trust Co. v. Debolt, 16 How., 427, 432 (1853.)]
>
> The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this Court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal.

1 Wall. at 206; *accord, Havemeyer v. Iowa County,* 3 Wall. 294 (1876).

Later, in *Muhlker v. New York and Harlem R.R. Co.,* 197 U.S. 544 (1905), this Court prohibited the taking of property through a state judicial decision which destroyed the property right by overruling prior decisions establishing that right. This Court stated:

> When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.
>
> And this is the ground of our decision. We are not called upon to discuss the power or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it.

197 U.S. at 570.

The most recent learning from this Court on the issue came in the concurring opinion of Justice Stewart in *Hughes v. Washington,* 389 U.S. 290 (1967). In *Hughes,* the State of Washington claimed ownership of land that had been deposited by the ocean on adjoining upland property conveyed by the United States prior to the date Washington became a state. This Court determined that the issue of ownership was controlled by federal law. Justice Stewart, however, believed that the issue was controlled by state law but that the state court's most recent construction of state law on the issue "effected an unforeseeable change in Washington property law as expounded

by the State Supreme Court." 389 U.S. at 297 (Stewart, J., concurring). Thus, Justice Stewart concluded that the state court decision constituted a taking of property without just compensation. According to Justice Stewart:

> To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.

Id. at 296-97.

B. Recent Decisions Affording Protection Against Unjustified Retroactive Changes In Law

In a series of recent decisions, this Court has developed a doctrine of nonretroactivity to be applied in cases where unanticipated federal judicial rulings would upset well-founded reliance interests. *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 103 S. Ct. 3492 (1983); *Hill v. Stone*, 421 U.S. 289 (1975); *Lemon v. Kurtzman*, 411 U.S. 192 (1973); *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969). In another recent case, this Court applied the Due Process and Taking Clauses of the Fifth Amendment to invalidate federal executive and judicial action which nullified without compensation reasonable investment-backed expectancies which this Court found to constitute a property right. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). These two lines of authority support a conclusion that the federal constitution limits state impairments of contractual obliga-

tions through retroactive executive and judicial rule-making.

In the cases developing a doctrine of nonretroactivity for unanticipated federal judicial rulings, this Court has recognized the "fact of legal life" that judges, as well as state legislatures, make law[5] and that "*even judge-made rules of law* are hard facts on which people must rely in making decisions and in shaping their conduct." *Lemon v. Kurtzman*, 411 U.S. 192, 199 (1973) (emphasis supplied). In *Lemon*, this Court *abandoned* the principle of *Norton v. Shelby County*, 118 U.S. 425 (1886), relied on by the court below, that an unconstitutional statute "confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." 118 U.S. at 442. Thus, when this Court determines whether to apply a constitutional decision retroactively, it now engages in a "process of reconciling the constitutional interests reflected

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[5] Under Oklahoma law, the actions of the state's Attorney General and tax officials impairing the obligation of petitioner's contract were legislative in character and effect. Opinions of the Attorney General of Oklahoma "prescribe substantive law" of "'general applicability'" and "have the force and effect of a 'rule'" which other public officials, such as respondent tax authorities, are under a duty to obey. *Grand River Dam Authority v. State*, 645 P.2d 1011, 1014-1015, 1016 (Okla. 1982). The legislative character of the assessment functions of state tax officials also has been recognized by the Oklahoma Supreme Court, holding "that the valuation of property for purposes of taxation is an incident to the taxing power, which is vested in the legislative power of this state." *In re Assessment of Kansas City Southern Ry. Co.*, 168 Okla. 495, 33 P.2d 772, 780 (1934); *see also State ex rel. Poulos v. Board of Equalization*, 646 P.2d 1269, 1275 (Okla. 1982) (Simms, J. dissenting) (functions of Board of Equalization are legislative).

By the same token, a state court's declaration of a new, unanticipated rule, through the limitation of its own prior holdings and the contradiction of previously well-established executive and legislative constructions, amounts to the creation of new law which is legislative in character and effect.

in a new rule of law with reliance interests founded upon the old." *Lemon, supra,* 411 U.S. at 198; *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971).[6] Implicit in this process is a recognition by this Court that these reliance interests can themselves reach constitutional proportions in some instances, and that due process sometimes might be denied if these reliance interests simply were swept away with the old rule of law.

In *Kaiser Aetna v. United States, supra,* this Court invoked the Due Process and Taking Clauses to prevent a taking without compensation which the federal government sought to accomplish through administrative action and judicial enforcement of purported statutory authority. 444 U.S. at 168-69. The federal government asserted a navigational servitude to permit free public access to a pond, Kuapa Pond, after Kaiser Aetna had invested millions of dollars in improvements based on the reasonable expectation that the pond was private property. Kaiser Aetna was thereby prevented from contracting with customers to charge an annual access fee. This Court held that Kaiser Aetna had "expectancies embodied in the concept of 'property' – expectancies that, if sufficiently important, the Government must condemn and pay for before it takes . . ." (444 U.S. at 179) because "Kuapa Pond has always been considered to be private property under Hawaiian law." *Id.* In an even more recent case, *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, ..., 102 S. Ct. 3164, 3171 (1982), this Court noted that "the degree of interference with investment-backed expectations is of particular significance" to a deter-

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[6] In *Chevron,* this Court articulated a three-part test, which has been followed in the subsequent cases, to determine when the doctrine of nonretroactivity will apply: (1) whether the new decision is a clear break from prior law which was not foreshadowed; (2) whether retroactive effect is necessary for the operation of the new principles announced; and (3) whether substantial inequity would result from a retroactive application. 404 U.S. at 106-108.

mination whether there has been a violation of the Due Process Clause of the Fourteenth Amendment.

C. Restitution Principles

This is also the type of case in which this Court has previously recognized the existence of a right to restitution. Under the view most favorable to the state of Oklahoma there was a contract which failed because of a new and unforeshadowed rule of law, after petitioner had provided its consideration in full. In such circumstances, Oklahoma has been unjustly enriched if it does not (a) meet its obligation under the contract, or (b) restore the consideration it has received as a result of the mistake. *See* RESTATEMENT OF THE LAW, RESTITUTION § § 47-49 (1937). Here, there is no feasible way to restore the consideration. Thus petitioner retains a right to restitution. In *Louisiana v. Wood*, 102 U.S. 294 (1880), this Court held that the purchaser of unauthorized and invalid municipal bonds was entitled to restitution of his investment, with interest, stating that "[i]t would certainly be wrong to permit the city to repudiate the bonds and keep the money borrowed on their credit" where "[t]he consideration on which the payment was made has failed, because the bonds were not, in fact, valid obligations of the city." 102 U.S. at 298-299. The Court below failed to allow any restitutionary recovery to compensate for the destruction of petitioner's contract and property rights. Oklahoma therefore took petitioner's property without providing just compensation and thereby violated the Due Process and Taking Clauses.

II. Cases Failing To Apply A Federal Constitutional Limit On The Retroactivity Of State Executive And Judicial Rulemaking Are Distinguishable.

Two decisions of this Court constitute the primary authority for the assertion that the federal constitution does not limit retroactive rulemaking by state executive and judicial officers. They are *Tidal Oil Co. v. Flanagan*,

263 U.S. 444 (1924), and *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932).

In *Tidal Oil Co., supra,* this Court held that "the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law." 263 U.S. at 450. In *Sunburst Oil & Refining Co., supra,* Justice Cardozo declared, in writing for the Court:

> We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward.

287 U.S. at 364.

Both *Tidal Oil* and *Sunburst* are clearly distinguishable from this case. Neither involved a state's repudiation of its own obligations under a contract of a financial nature, a situation which this Court has recently stated calls for "particular scrutiny" (*Allied Structural Steel Co. v. Spannaus, supra,* 438 U.S. at 244) and in which "complete deference . . . is not appropriate because the State's self-interest is at stake." *United States Trust Co. of New York v. New Jersey, supra,* 431 U.S. at 26.

Neither *Tidal Oil* nor *Sunburst* involved a complete repudiation of one contracting party's obligation after full performance had been rendered by the other party, the situation presented by this case in which petitioner has fully performed and the State of Oklahoma has performed hardly at all. Nor were the affected parties in *Tidal Oil* and *Sunburst* deprived of consideration for substantial and irrevocable investments made in reasonable reliance upon long-standing state practice and legal precedent and assurances of the highest state officials. [7]

[7] Recent decisions by two state courts in cases involving public contracts are similarly distinguishable. *See Chemical Bank v. Washington Public Power Supply System,* 666 P.2d 329 (Wash. 1983); *Asson v. City of Burley,* 670 P.2d 839, (Idaho 1983).

Tidal Oil in particular rests upon an outmoded view of the law which holds that judges do not make new law but simply declare what the law has always been. This Court has clearly rejected that view in its recent cases dealing with the retroactivity of federal judicial rulings. *See pp.* 12-14 *supra.* Moreover, in one of those recent cases, *Lemon v. Kurtzman,* this Court indicated that, despite Justice Cardozo's *dictum* in *Sunburst,* federal constitutional interests cannot be ignored when considering the retroactive application of an unanticipated judicial decision. 411 U.S. at 200 n.2.

III. The Extraordinary Circumstances Present In This Case Provide A Proper Line Of Demarcation Between Permissible And Impermissible Retroactive Rulemaking By State Executive And Judicial Officers.

Decisions of this Court supporting the proposition that the federal constitution imposes limits on the circumstances in which a state may impair the obligation of contracts by retroactive executive or judicial rulemaking also suggest those circumstances where constitutional protection is appropriate. Specifically, those decisions establish that a state may not so impair the obligations of a contract when the extraordinary facts present in this case are shown to exist:

1) the obligation the state has impaired is that of the state itself (*Allied Structural Steel Co., supra; United States Trust Co. of New York, supra*);

2) the state's contract is of a financial nature (*United States Trust Co. of New York, supra*);

3) the other party to the contract has made a substantial and irrevocable change in position in reasonable reliance upon long-standing state practice and precedent and the assurances of authoritative

state officials (*Kaiser Aetna, supra; Lemon, supra; Chevron Oil Co., supra; Muhlker, supra; Gelpcke, supra*);

4) the other party to the contract has fully performed (*Lemon, supra; Chevron Oil Co., supra; Gelpcke, supra*);

5) the executive or judicial decision sought to be retroactively applied represented a clear break from prior law and was not foreshadowed (*Kaiser Aetna, supra; Lemon, supra; Chevron Oil Co., supra; Hughes, supra* (Stewart, J., concurring)); and

6) retroactive effect is not necessary for the operation of the new principles announced in the unanticipated decision (*Chevron Oil Co., supra*).

These circumstances and this case in particular afford this Court the clear opportunity to adopt Justice Stewart's conclusion in *Hughes, supra,* that "the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature. . . ." 389 U.S. at 298.

IV. The Decision Below Creates Great Uncertainty Concerning The Enforceability Of Financial Contracts To Which A State Is A Party.

The decision below permits a state to accomplish through its executive and judicial branches what it could not constitutionally do through its legislature: the repudiation of the state's obligations under a contract after the state has received the benefits of full performance by the other party to the contract. Such a result completely undermines the general purpose of the Contract Clause: "to en-

courage trade and credit by promoting confidence in the stability of contractual obligations." *United States Trust Co. of New York, supra,* 431 U.S. at 15.

If the decision below is allowed to stand, it will seriously disrupt contractual relations between private parties and state governments not just in Oklahoma, but throughout the country. Henceforth, no private party will be able to enter into a contract with a state without running the risk that, after the private party's performance is completed, state officials will find a way to repudiate their part of the bargain. Private parties will no longer be able to rely on state court decisions, Attorney General opinions, or state administrative practice upholding the authority of state officials to enter into a particular agreement, no matter how strong the precedent or long-lasting the practice.

The risk of repudiation will be greatest when the agreement in question involves financial obligations of state governments. As this Court has pointed out, "[a] governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *United States Trust Co., supra,* 431 U.S. at 26. With state and local governments searching for sources of increased revenues, the political pressure will be great to repudiate tax abatement agreements that have been reached with businesses. State judges often are no more immune from such political pressures than are state legislators and executives.

The existence of the risk that a state may not be relied upon to fulfill its part of a financial bargain could lead to increased costs for states when they enter into financial contracts with private parties. Oklahoma will

have to pay a premium for putting itself in position to break its contracts. States that have no intention of repudiating their contracts through administrative or judicial action may also be penalized. These states will have to pay the same premium as Oklahoma since, unless the decision below is reversed, the risk will remain that any state can simply walk away from its financial commitments by making a bargain, accepting its fruits, and then changing the rules of the game.

The Oklahoma court suggested in its decision that, if petitioner wanted to be sure that its tax exemption agreement with the state was lawful, petitioner should have filed a declaratory judgment action. Such a suggestion is completely unrealistic, reflects poor public policy and is, in fact, unauthorized where an actual controversy does not exist. If a private party had to file a declaratory judgment action every time it entered into a contract with a state in order to ensure that the state had the authority to enter into such a contract, the courts would be clogged with such actions – most of which would be unnecessary and wasteful – and states would be unable to render vital services in a timely and efficient manner. Moreover, even if a favorable declaratory judgment were obtained from a lower court, review by the state's highest court would always be required in order to prevent a subsequent retroactive taking of contract rights by that court.

Under the decision below, state officials and private parties must either refuse to act until "there has been an authoritative judicial determination that the governing legislation is constitutional . . . or risk draconian, retrospective decrees should the legislation fall." *Lemon v. Kurtzman*, 411 U.S. at 207. Even then, there remains the risk that a subsequent "authoritative judicial determination" could overturn the previous one. Such a situation "seriously undermine[s] the initiative of state legislators

and executive officials alike," 411 U.S. at 208, as well as the willingness of private parties to enter into agreements with those state officials.

The impact of the decision below will be widespread. Tax abatement agreements are common throughout the United States both at the state and local level. Tax abatement is a great equalizer available to depressed areas for improving their position by attracting new private investment and thus increasing the availability of jobs. Hundreds of businesses have made large capital investments in reliance on the validity of those agreements under state laws as the laws existed at the time the agreements were entered into. The decision below places each one of those agreements in jeopardy. This Court should review and reverse the decision below to assure these businesses that their tax abatements may not be taken away after substantial and irrevocable investments have been made in reliance on those agreements.

CONCLUSION

"A claim that a State statute impairs the obligation of contract is an appeal to the United States Constitution, and cannot be foreclosed by a State court's determination whether there was a contract or what were its obligations." *Atlantic Coast Line R. Co. v. Phillips*, 332 U.S. 168, 170 (1947). The scope of this constitutional protection and its applicability to petitioner's contract with Oklahoma are, in terms of the Contract, Due Process, and Taking Clauses, federal questions which should be resolved by this Court.

The petition for a writ of certiorari should be granted.

Respectively submitted,

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December 1983

APPENDIX

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

GENERAL MOTORS CORPORATION,
Appellant,
v.
OKLAHOMA COUNTY BOARD OF EQUALIZATION, GEORGE KEYES, COUNTY ASSESSOR OF OKLAHOMA COUNTY, and JOE B. BARNES, COUNTY TREASURER OF OKLAHOMA COUNTY,
Appellees,
and
JAN ERIC CARTWRIGHT, Attorney General of Oklahoma,
Defendant-Intervenor/Appellee.

No. 58,438

FOR PUBLICATION

• • • •

Appeal from the District Court, Oklahoma County, Oklahoma

HONORABLE JACK R. PARR, District Judge.

• • • •

George Keyes, County Assessor of Oklahoma County, issued to appellant, General Motors Corporation, a "Notice of Change of Assessed Valuation" on the General Motor's Assembly Plant located in Oklahoma City, Oklahoma.

General Motors filed a protest with the Oklahoma County Board of Equalization and it denied the protest.

General Motors appealed the denial of its protest to the District Court. The disputed taxes were paid under protest and General Motors filed suit for refund.

The District Court rendered summary judgment in favor of defendant public officials (appellees) and General Motors appealed.

• • • •

JUDGMENT AFFIRMED

• • • •

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IRWIN, J.:

The Oklahoma Industries Authority (OIA), a public trust, created pursuant to 60 O.S.1961, § 176 et seq., as amended, sponsored the "public trust" financing for the construction of General Motors Corporation's (GMC) assembly plant in Oklahoma City. The issue presented is whether GMC's interest (improvements, machinery and equipment) in the plant is subject to ad valorem taxation. GMC contends its interest is not taxable because of a tax abatement agreement between it and the State of Oklahoma. GMC asserts that public agencies and officials of the State of Oklahoma agreed that if GMC would build its assembly plant in Oklahoma that such plant would not be subject to ad valorem taxation for twenty years.

The trial court in rendering summary judgment against GMC found that Art. 10 § 5, of the Okl. Const. prohibits a contract which surrenders, suspends or contracts away the power of taxation, and although the existence of a contract is disputed, such contract, even if it could be established, would be void and contrary to law; and that the assembly plant is in possession of GMC under an executory contract of purchase and is taxable under *State ex rel. Cartwright v. Dunbar,* Okl. 618 P.2d 900 (1980).

Since the Legislature first authorized the creation of public trusts as a vehicle for "public trust" financing in 1951, numerous facilities throughout the state have been constructed by private entities using such financing. *Dunbar* explains the method generally employed in Oklahoma and such method was used in financing part of the construction of GMC's assembly plant. Here, a lease contract and bond indenture were entered into between the public trust (OIA) and GMC. OIA issued bonds to help pay for part of the construction costs of the facility. GMC paid all additional construction costs. OIA holds legal title to

the property. GMC's lease payments to OIA are sufficient to amortize the bond issue and other costs. GMC will "purchase" the entire project for $1,000 when the bonded indebtedness is satisfied.

In *Dunbar* we held that the trust properties in which private entities hold a possessory and contractual interest by virtue of a lease agreement with a public trust as holder of legal title was subject to ad valorem taxation. *Dunbar* was bottomed on the theory that the Dunbar lease agreement was nothing more or less than an executory contract of sale and that property of a public trust held under a sale-purchase executory contract is not constitutionally tax exempt. GMC concedes that its assembly plant would be taxable under *Dunbar* but for the tax abatement agreement.

GMC says that the characterization of its agreement with OIA as a "lease" or "executory contract" is not of consequence as GMC understands its tax abatement agr e-ment with Oklahoma. GMC states the substance of the agreement and this lawsuit is that Oklahoma agreed to a tax abatement for the assembly plant in return for GMC constructing the plant in Oklahoma. GMC says that it has fulfilled its part of the agreement.

GMC contends that the agreement was lawful when made and any state action which impairs the obligation of that agreement violates Art. 1, § 10, of the United States Constitution. GMC argues the Legislature in the Public Trust Act classified industrial property for tax purposes pursuant to Art. 10, § 22, of the Okl. Const., to improve economic activity and to create jobs in Oklahoma; that OIA, a state agency which was created pursuant to the Act, bargained with GMC for the tax abatement; and the negotiations and contracts of OIA constitute the negotiations and contracts of the State of Oklahoma. GMC also submits that the Attorney General's opinion (69-156) rendered in 1969, in which he expressed the view that

public trust properties were not subject to ad valorem taxation was incorporated into and became a part of the tax abatement agreement between OIA and the State.

Closely related to GMC's argument that the imposition of the ad valorem taxes impairs the obligations of its tax abatement agreement is its assertion that it has been denied due process. GMC argues that the Fifth Amendment through the Fourteenth Amendment of the Federal Constitution forbids the taking of property without just compensation and that its tax abatement agreement is a property right. GMC says that both contract and property rights arising from its tax abatement agreement are protected by the Due Process Clause as well as by the Impairment of Contract Clause.

In *Dunbar* we considered the constitutionality of 60 O.S.1981, § 178.7 enacted in 1977. That enactment authorized a tax exemption for a period of years of all interests in public trust property, but the lessee (GMC-here) of public trust property was required to pay an annual sum in lieu of ad valorem taxes for each year following the tenth anniversary date of the issuance of the revenue bonds.

In *Dunbar* we said that Art. 5, § 50, Okl. Const., prohibits the Legislature from exempting any property from taxation except as provided in the Constitution. We held that since other property similarly situated was statutorily taxable, any legislative attempt to delay the taxable status of a lessee's interest in public trust property would be in conflict with Art. 5, § 50, supra, and unconstitutional.

Art. 10, § 22, of the Constitution authorizes the Legislature to classify property for purposes of taxation; and the valuation of different classes by different means or methods. The Legislature has a wide range of discretion in classifying subjects of taxation, and to justify judicial interference, the classification must be based on an unreasonable or arbitrary classification. *Continental Oil*

Company v. Oklahoma State Board etc., Okl. 570 P.2d 315 (1977).

Although the property belonging to a public trust is exempt from taxation – Art. 10, § 6, Okl. Const. – the interest a lessee (GMC-here) has in public trust property is subject to ad valorem taxation. *Dunbar, supra.*

If the property here had not been "leased" from a public trust, it would have been taxed as all other property similar situated under our general statutory scheme of taxation. Any attempt, legislative or otherwise, to exempt property from taxation in the possession of a "lessee" under an executory contract of purchase where the record title to the property is in a public trust, and not exempt similar property where record title to the property is in a private entity instead of a public trust, would contravene Art. 10, § 22, supra.

In *Dunbar* we also held that the State was not estopped from assessing the "lessee's" property because of its reliance on the generally held view that such interest was exempt from taxation. Our holding was based on the principle that a state and its subdivision cannot be estopped from protecting public rights when public officials have acted erroneously or failed to act.

We will now consider the enforceability of the alleged tax abatement agreement. GMC did not introduce the agreement into the record but relied upon certain opinions of the Attorney General, statements of officials of the State of Oklahoma and of various civic organizations, correspondence and news releases, and representations made by officials of OIA. In its journal entry of judgment the trial court in referring to the agreement said "although its existence is in dispute, such contract, even if it could be established, would be void and contrary to law."

The lease agreement between GMC and OIA did not spell out the tax abatement agreement but it did mention ad valorem taxes. One sentence stated that the parties

recognized that as OIA is an agency of the state, the assembly plant was not subject to ad valorem taxation under the Constitution and laws of Oklahoma. However, the parties did agree that in the event the State of Oklahoma or any of its subdivisions shall demand the payment of any general or ad valorem tax that GMC would pay the tax.

We will assume, arguendo, that OIA, a state agency, entered into the tax abatement agreement with GMC; and that both parties relied upon the then current Attorney General's opinion which expressed the view that public trust properties were not subject to taxation.

Under general legal principles, public agents have no power to bind the state or any of its subdivisions by apparent authority in excess of their actual authority. "An unconstitutional act is not a law; it binds no one, and protects no one." *Little Rock, etc., Railway v. Worthen;* and *Huntington v. Worthen,* 120 U.S. 97, 30 L.Ed. 588, 7 S.Ct. 469. If the Legislature has not acted within the framework of the Constitution, it has not acted. An unconstitutional statute confers no rights, creates no liability, and affords no protection. *Norton v. Shelby County,* 118 U.S. 425, 30 L.Ed. 178, 6 S.Ct. 1121. In *Zane v. Hamilton County,* 189 U.S. 370, 47 L.Ed. 858, 23 S.Ct. 538, county bonds were issued pursuant to a statute which was later declared to be unconstitutional. The United States Supreme Court held that the bonds having been illegally issued, do not constitute a contract which is protected by the Federal Constitution. 16A Am.Jur.2d, *Constitutional Law,* § 688, states:

> "The Federal Constitution does not protect contracts which are invalid, illegal . . . That which is not an enforceable contract right is not an obligation which can be impaired within the meaning of the constitutional prohibition.
>
> The impairment of a contract cannot occur where the alleged contract is based on a proviso con-

tained in a void statute. A contract which rests on an unconstitutional statute is itself void and creates no obligation to be impaired by subsequent legislation."

The cases relied upon by GMC involve constitutional legislative enactments or valid contracts and it relies on the principle that "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it," *United States ex rel. Hoffman v. The City of Quincy*, 71 U.S. 535, 18 L.Ed. 403 (1867), quoted in *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 78 L.Ed. 413, 54 S.Ct. 231, 88 A.L.R. 1481 (1934). This general statement of law cannot be disputed but it does not support GMC's position, because the purported tax abatement contract was not in accord with Oklahoma law at the time it was made.

We are concerned here with an alleged tax exemption that the Legislature could not constitutionally grant. Surely if the Legislature is without constitutional authority to grant a tax exemption, state agencies or officials of the state could not grant such exemption. The grantee of an exemption is chargeable with notice of our Constitution and the limitations of public officials, and he may not rely on assumed authority whether such authority is assumed by the Legislature or other public officials.

Our decision in *Dunbar* is controlling in the case at bar and GMC's property is subject to ad valorem taxation unless the alleged tax abatement agreement is enforceable. The Federal Constitution does not protect unenforceable contract rights. The alleged agreement is void because no public official or public agency could constitutionally grant the tax exemption contained in the agreement. Since such agreement is unenforceable, GMC is not entitled to the tax relief it sought.

JUDGMENT AFFIRMED.

ALL THE JUSTICES CONCUR.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

GENERAL MOTORS,
Appellant,
v.
OKLAHOMA COUNTY BOARD OF EQUALIZATION, GEORGE KEYES, COUNTY ASSESSOR OF OKLAHOMA COUNTY, and JOE B. BARNES, COUNTY TREASURER OF OKLAHOMA COUNTY,
Appellees,
and
JAN ERIC CARTWRIGHT, Attorney General of Oklahoma,
Defendant-Intervenor/Appellee.

No. 58,438

FOR PUBLICATION

ORDER

Rehearing granted. This Court's decision filed on May 17, 1983 is amended as follows:

Page 7 of the typewritten opinion is deleted and inserted in lieu thereof the following:

> The impairment of a contract cannot occur where the alleged contract is based on a proviso contained in a void statute. A contract which rests on an unconstitutional statute is itself void and creates no obligation to be impaired by subsequent legislation."

GMC argues that the rule in *Norton* has long been abandoned by both the federal and state courts and this abandonment is discussed in *Lemon v. Kurtzman*, 411 U.S. 192, 36 L.Ed. 151 (1973). In *Lemon*, non-public sectarian schools had performed services under a statute which was

subsequently declared unconstitutional. The issue was whether the schools were entitled to be reimbursed for services performed prior to the court's holding that the statute was unconstitutional. The Supreme Court held the schools were entitled to be reimbursed for such services.

The *Lemon* decision is bottomed upon the theory of reliance, i.e., the schools had performed the services under a statute that had not been declared unconstitutional and for nearly two years the State and the schools proceeded to act on the assumption that the schools would continue to perform the services and that payment for such services would be made. The Court noted that the significance of the school's reliance was reinforced by the fact that State withdrew its motion for a preliminary injunction to block certain payments and did not seek injunctive relief for the suspension of payments.

The Supreme Court in *Lemon*, discussing the broad discretionary powers of the trial court in shaping equity decrees, said:

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."

This court in effect followed the reasoning set forth in *Lemon* when it first considered the taxability of public trust property held under an executory contract to purchase in *Dunbar*. Our decision in *Dunbar* was promulgated in January, 1980, and was prospective in reference to taxability. In discussing the retroactive application of that decision, we said:

> "In our opinion the 'equities in this case do not authorize retroactive application of our decision here-

in' (see *Ford, supra*) to any year preceding the 1980 tax year. Prior to the July 31, 1979, opinion of the Attorney General expressing the conclusion that such property was taxable, the taxing authorities had been following a former opinion of an Attorney General who had concluded the property was tax-exempt. Therefore, the interests of private entities in public trust property which are taxable under this decision shall be taxable beginning with the 1980 tax year, but no interests in any public trust property shall be considered or treated as 'omitted property' for any preceding year."

We are concerned here with an alleged tax exemption that the Legislature could not constitutionally grant. Surely if the Legislature is without constitutional authority to grant a tax exemption, state agencies or officials of the state could not grant such exemption. GMC was charged with notice of our Constitution and the limitations of public officials, and it may not rely on assumed authority whether such authority is assumed by the Legislature or other public officials. GMC was charged with notice of the authority of the Attorney General whose opinions may not supplant the courts. The Attorney General gives his opinion for public officials' guidance until the questions concerning them are decided by the courts. *Grand River Dam Authority v. State*, Okl., 645 P.2d 1011 (1982). GMC may not invoke this proceeding the "reliance interest" discussed in *Lemon*.

The cases relied upon by GMC involve constitutional legislative enactments or valid contracts and it relies on the principle that "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it," *United States ex rel. Hoffman v. The City of Quincy*, 71 U.S. 535, 18 L.Ed. 403 (1867), quoted in *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 78 L.Ed. 413, 54 S.Ct. 231, 88 A.L.R. 1481 (1934). This general statement

of law cannot be disputed but it does not support GMC's position, because the purported tax abatement contract was not in accord with Oklahoma law at the time it was made.

Our decision in *Dunbar* is controlling in the case at bar and GMC's property is subject to ad valorem taxation unless the disputed tax abatement agreement is legally enforceable. The Federal Constitution does not protect unenforceable contract rights. The disputed agreement, even if it could be established, is void because no public official or public agency could constitutionally grant the tax exemption allegedly contained in the agreement. Since the alleged agreement is unenforceable, GMC is not entitled to the tax relief it sought.

In view of our decision here, we find it unnecessary to consider the force and effect of Art. 10, § 5 of our Constitution which prohibits the surrender of the power of taxation and requires taxes to be uniform upon the same class of subjects and the Fourteenth Amendment to the U. S. Constitution.

JUDGMENT AFFIRMED.

AMENDMENT DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 21st day of July, 1983.

s/ DON BARNES
CHIEF JUSTICE

ALL THE JUSTICES CONCUR.

FOR OFFICIAL PUBLICATION

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

GENERAL MOTORS CORPORATION,
Appellant,
v.
OKLAHOMA COUNTY BOARD OF EQUALIZATION, GEORGE KEYES, COUNTY ASSESSOR OF OKLAHOMA COUNTY, and JOE B. BARNES, COUNTY TREASURER OF OKLAHOMA COUNTY,
Appellees,
and
JAN ERIC CARTWRIGHT, Attorney General of Oklahoma,
Defendant Intervenor/Appellee.

No. 58,438

FILED
SUPREME COURT
STATE OF OKLAHOMA
OCT. 4, 1983
Ross N. Lillard, Jr.
CLERK

SUPPLEMENTAL OPINION ON REHEARING

PER CURIAM:

We hereby supplement the opinion of this Court of May 17, 1983 (54 O.B.J. 1351) as amended by Order of July 26, 1983 (54 O.B.J. 2068) by adding thereto the following:

A further review of *Lemon v. Kurtzman,* 411 U.S. 192, 36 L.Ed.2d 151, 93 S.Ct. 1463 (1973) impels the conclusion that the rule of *Norton v. Shelby County,* 118 U.S. 425, 30

L.Ed. 178, 6 S.Ct. 1121 (1886) (that an unconstitutional statute "confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed") was not abandoned in *Lemon*. *Lemon* merely recognized an exception to the rule of *Norton* to be applied by a court of equity under certain prescribed conditions. As we shall briefly demonstrate, the parameters of the *Lemon* exception have many times been recognized and applied by this Court; and we shall further demonstrate that those parameters are not present in the case at bar.

After striking down of Pennsylvania's statutory program to reimburse non-public sectarian schools for secular educational services in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L.Ed.2d 745, 91 S.Ct. 2105 (*Lemon I*), the Supreme Court remanded to the district court which enjoined payments for services rendered after *Lemon I*, but permitted reimbursement for services prior to *Lemon I*. Appellants challenged the scope of this decree (a case in *equity*).

The circumstances peculiar to *Lemon II* were:

1. After the statute became effective, the schools entered into the contracts in good faith, relying upon the apparent statutorial authority.

2. Thereafter, Appellants sought preliminary injunction to restrain payment under the scheme. However, Appellants abandoned their request for injunction to prevent the initial payment. The schools continued performing the services authorized by statute. Not until a motion for summary judgment was filed did Appellants first indicate their intent to seek to enjoin.

3. The schools could not, prior to *Lemon I*, have predicted the act's unconstitutionality with assurance sufficient to undermine Appellees' reliance on the statute. *Lemon I* was not "foreshadowed."

4. The schools had a "reliance interest" to be considered in fashioning an *equity* decree calling for a "sensible recognition of the practical realities of the situation."

5. Appellants urged a strange amalgam of flexibility and absolutism, claiming on the one hand they did not seek to have the schools disgorge prior payments, yet seeking to enjoin future payments, and urged injunction under the rule of *Norton*.

6. Great hardship would be imposed upon the public, state officers, school budgets and implemented school programs if the rule of *Norton* were to be immutably applied as of the date of the *Lemon I* decision.

In fashioning the equity decree in the light of the rule of *Norton* and of the "reliance interest" thus demonstrated, the United States Supreme Court observed, statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct; until judges say otherwise, *state officers* have the power to carry forward the directives of the state legislature; those officials may, in some circumstances, elect to defer acting until authoritative judicial pronouncement has been secured; but where there are no fixed and clear constitutional precedents, the choice is essentially one of discretion, and state officials may rely upon the basic presumption of constitutional validity of a duly enacted statute.

The Supreme Court concluded by saying that federalism requires that federal injunction, unrelated to state courts, be shaped with concern and care for the responsibilities of the executive and legislative branches of state government. "In short, the propriety of the relief afforded Appellants by the District Court, applying familiar equitable principles, must be measured against the totality of circumstances and in light of the general principle that, absent contrary direction, state officials and those with

whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful."

The circumstances in the case at bar are not analagous to and, in fact, are significantly different than those in *Lemon II*.

a. *Lemon II* involved the fashioning of a decree in *equity*. The case at bar is a statutory proceeding (denial of protest seeking recovery of taxes paid). While our code pleading purports to abolish the distinction between actions at law and actions in equity, "A party bringing an action is required to frame his pleading in accord with some definite, certain theory, and the relief to which he claims to be entitled must be in accord therewith; on appeal he is bound by the position and theory assumed, and on which the case was heard in the trial court." *Yellow Cab Company v. Allen*, Okl., 377 P.2d 220 (1962), quoting from *Lenz v. Young*, Okl., 307 P.2d 844 (1957). A chancellor has power to do equity and mold a decree to the necessities of a particular case. *U.S. v. Fogaley* (C.A. Okl. 1951) 190 F.2d 163; *Sinclair Oil & Gas Co. v. Bishop*, Okl., 441 P.2d 436 (1967). But in law, a trial court is limited to the particular issues framed by the pleadings. *La Bellman v. Gleason & Sanders, Inc*, Okl., 418 P.2d 949 (1966). In the fashioning of a judgment in law, courts are less impelled to apply principles of equity.

b. No compulsion on the part of public officials to perform statutory duties until otherwise directed by the courts is involved in the case at bar, in contrast to *Lemon II*.

c. General Motors Corporation had a free choice as to whether it would rely upon the opinions and representations of public officials as to the constitutionality of the non-tax "agreements." It was under no compulsion to act in reliance. It could have obtained a declaratory judgment prior to entering into the purported non-tax arrangement.

Instead, it relied upon the representations in the face of the Constitution and laws of Oklahoma, and did so at its peril.

d. There is a strong suggestion of *public weal* involved in *Lemon II* and other cases in considering the force of a "reliance interest" as against the unconstitutionality of a contract or statute where prospective effect is given by court decree to a determination of unconstitutionality. In the case at bar, the reliance interest to be weighed involves General Motors Corporation's individual rights only. In *Lemon II*, mid-term school budgets, programs, and expenditures made in reliance upon a statute would invoke an extreme *public* hardship if abruptly terminated by a decree of unconstitutionality.

Our determination herein that the circumstances present in the case at bar do not place it within the exception enunciated in *Lemon II* to the rule of *Norton* is consistent with the prior holdings of this Court.

In *Oklahoma Ed. Ass'n, Inc. v. Nigh*, Okl., 642 P.2d 230 (1982), a large number of individuals acted in reliance upon the constitutionality of a statute prior to this Court's determining it to be unconstitutional. The liability of public officials who acted in good faith reliance upon the constitutionality of the statute was likewise involved (p. 239). Both considerations impelled the Court to protect officials and citizens from liability which would result if this Court's opinion was given retrospective effect.

In *State ex rel. Poulos v. State Bd. of Equal.*, Okl., 646 P.2d 1269 (1982) (Poulos III), and 552 P.2d 1138 (1976) (Poulos II), an unconstitutionally inequal established system of tax valuation was determined to exist. The ability of the various county governments to function, the reliance interests of great numbers of taxpayers, and the potential liability of public officials were implicitly involved. The Court in fashioning its decree made its effective date prospective.

In *State v. Board of County Com'rs of Creek County*, 188 Okl. 104, 107 P.2d 542 (1940), a large number of delinquent taxpayers secured a reduction of their taxes under a statute thereafter adjudged unconstitutional, while other taxpayers did not. The County Commissioners and County Treasurer continued to act under the law after the action was filed against them questioning the act's constitutionality, and after they had been advised by the Attorney General to refrain from acting under it, and after they were advised by the Attorney General that the act had been adjudged, and was, unconstitutional. During the time the defendant officers were proceeding under the act, they reduced the assessments and taxes on some 4,264 separate pieces of property. Applying what was in effect equity reliance rules, this Court said (547):

> "One asserting rights under such a void law must bring himself within some established exception [to the rule of *Norton*]. The rule that no rights may be acquired under such a statute applies as well to rights acquired under acts performed or executed pursuant to such statute before the final determination of the unconstitutionality thereof, as to those sought to be acquired under acts performed thereunder."

In striking down the statute and in declining to ameliorate the effect of a pronouncement of unconstitutionality, this Court said (554):

> "It follows that the contention of the plaintiffs must be sustained. To hold otherwise and to sustain the judgment of the trial court would be to say that constitutional inhibitions may be lightly defeated and circumvented by subordinate executive officers, acting in excess of their lawful authority, provided the acts of such officers were fully consummated before the extent of their authority is determined in the proper forum — namely the courts. This we cannot do. Such a rule would encourage citizens to rush in and get relief under a doubtful law before its validity could be tested in the courts. It would encourage

hasty action on the part of administrative officers, where deliberation and caution should be encouraged instead. It would discourage the prompt payment of taxes by holding out to the taxpayers the prospect of future legislation under which they might obtain special advantages. It would open an easy avenue for the evasion and defeat of constitutional safeguards, not only in tax matters, but in others."

In *Gordon v. Conner*, 183 Okl. 82, 80 P.2d 322, 118 ALR 783 (1938), plaintiff resident taxpayers sought recovery against the sheriff and members of the board of county commissioners under a statute authorizing the action to recover sums paid to the defendants pursuant to a statute thereafter determined to be unconstitutional. At issue was the weighing of the public interest in recovering sums paid out under a void statute against the duty of public officials to perform their statutory duties and their right to rely upon the statute's presumed constitutionality (p. 324):

"The sheriff, however, relying upon the provisions of the special act, appointed six deputies. In this action plaintiffs seek to recover for the county, a sum equal to the salaries paid to the two deputies from July 1, 1933, to the date of filing the suit (April 27, 1936), and a similar sum for their own use and benefit.

"The trial court held that the special act was unconstitutional, but further held that the case of Wade v. Board of Commissioners of Harmon County, 161 Okl. 245, 17 P.2d 690, was controlling of the issues involved herein. In that case, it was held: 'The members of the board of county commissioners of a county will not be penalized . . . for the payment of salaries to county officers under an unconstitutional local act where such payments were made in good faith and before the law is declared unconstitutional, or before they are advised by the proper official as to its unconstitutionality.'

> "No contention is made that defendants were ever advised by the proper officials as to the unconstitutionality of the special act. Plaintiffs take the position that since this court on several occasions has held similar acts to be unconstitutional, the defendants, being chargeable with a knowledge of the law, are chargeable with knowledge of the unconstitutionality of the special act involved herein. We cannot concur in this contention. The unconstitutionality of the special act involved herein had never been judicially established. Defendants were entitled to rely thereon as a source of authority for their official acts without assuming the risk of incurring heavy penalties in the event such act was subsequently declared to be in controvention of a constitutional provision and therefore invalid. The presumption is that a law is constitutional until its unconstitutionality is judicially established." (Citation omitted.)

State ex rel. Cartwright v. Dunbar, Okl., 618 P.2d 900 (1980) comports with *Lemon II* and the foregoing cases. It is in line with the general rule in Oklahoma and elsewhere. See 16 Am Jur 2d Constitutional Law, §§ 256, 257, 688.

BARNES, C.J., HODGES, LAVENDER, DOOLIN, HARGRAVE, OPALA, and WILSON, JJ., concur.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

OKLAHOMA INDUSTRIES AUTHORITY
and
GENERAL MOTORS CORP.,
Plaintiff,
vs.
JOE B. BARNES, COUNTY TREASURER OF OKLAHOMA COUNTY, et al.,
Defendants,
and
JAN ERIC CARTWRIGHT, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,
Defendant-Intervenor.

No. CJ-80-4524
CJ-81-422

FILED IN THE DISTRICT COURT
OKLAHOMA CITY, OKLA.
APR. 23, 1982
DAN GRAY, Court Clerk
By ..... DEPUTY

JOURNAL ENTRY

NOW on this 25th day of March, 1982, this matter comes on for full hearing before the undersigned Judge on the Motions for Summary Judgment filed herein by Defendants and the Defendant-Intervenor; the Plaintiff, GENERAL MOTORS, appeared by and through its attorneys of record, JOHN JOSEPH SNIDER and MARGARET McMORROW LOVE; the Plaintiff, OKLAHOMA INDUSTRIES AUTHORITY, appeared by and through its attorney of record, DAVID NICHOLS; the Defendants, JOE B. BARNES, County Treasurer, GEORGE KEYES, County Assessor, and the OKLAHOMA COUNTY BOARD OF EQUALIZATION appeared by and through their attorneys of record, GEORGE W. PAULL, JR. and JIMANNE HARRIS MAYS, Assistant District Attorneys;

and the Defendant-Intervenor, JAN ERIC CARTWRIGHT, Attorney General of Oklahoma, appeared by and through his attorneys of record, JAMES B. FRANKS and MICHAEL SCOTT FERN; the Court having considered the Pleadings herein, having considered all affidavits, admissions, answers to interrogatories, stipulations, extracts submitted from depositions and documents and exhibits tendered by all parties, and having heard arguments and statement of counsel and considered all briefs submitted in support of or opposition hereto, and having been fully informed as to all matters sought to be presented by all parties finds as follows:

1. That the argument of counsel and briefs herein as well as the depositions, admissions, pleadings, stipulations, answers to interrogatories, affidavits and exhibits on file and tendered to and considered by the Court reflect that there is no substantial controversy as to any material fact.

2. That Article 10 Section 5 of the Oklahoma Constitution prohibits a contract which surrenders, suspends or contracts away the power of taxation and, although its existence is disputed, such contract, even if it could be established, would be void and contrary to law;

3. GENERAL MOTORS is in possession of the property sought to be taxed under an executory contract of purchase and, therefore, is fully taxable to GENERAL MOTORS under the authority of *State ex rel. Cartwright v. Dunbar,* 618 P.2d 900;

4. That the Attorney General's opinion 79-168 is a correct statement of the law and, therefore, approved by this Court both as to the reasons and conclusions stated therein;

5. That Attorney General's opinion 69-156 was an incorrect statement of the law and, therefore, properly withdrawn by Attorney General opinion 79-168.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motions for Summary Judgment of JOE B. BARNES, County Treasurer, GEORGE KEYES, County Assessor, THE OKLAHOMA COUNTY EQUALIZATION BOARD and JAN ERIC CARTWRIGHT, Attorney General of the State of Oklahoma be and they hereby are sustained.

s/ JACK R. PARR
JACK R. PARR, DISTRICT JUDGE

APPROVED:

s/ JIMANNE MAYS
JIMANNE MAYS, Assistant
District Attorney,
Attorney for Defendants

s/ JAMES B. FRANKS
JAMES B. FRANKS,
Assistant Attorney General,
Attorney for Defendant-
Intervenor

As to form:

s/ JOHN JOSEPH SNIDER
JOHN JOSEPH SNIDER,
Attorney for General Motors

As to form per order of Judge Parr:

s/ DAVID E. NICHOLS
DAVID NICHOLS,
Attorney for Oklahoma
Industries Authority

BOB TURNER FRANK BURNS VELT SHERMAN

THE OKLAHOMA COUNTY
EQUALIZATION AND EXCISE BOARD
ROOM 141 COUNTY OFFICE BUILDING
OKLAHOMA CITY, OKLAHOMA 73102

September 17, 1980

John Joseph Snider
Fellers, Snider, Blankenship, Bailey
& Tippens
2700 First National Center
Oklahoma City, Oklahoma 73102

Re: The Hertz Corp. (Warr Acres)
Acct. #14-788-2030 – File #80-461
The Hertz Corp. (The Village)
Acct. #17-892-1030 – File #80-460
General Motors Corporation
Acct. #14-389-5000 – File #80-458

Dear Mr. Snider:

Your protest has been carefully considered and reviewed by the Board of Equalization. Due to the ruling of the Attorney General and some Court Decisions, in best interest of the Board, we feel it is necessary to deny your request for tax exemption on The Hertz Corporation (Warr Acres), The Hertz Corporation (The Village), and General Motors Corporation.

Sincerely,

BOARD OF EQUALIZATION
OF OKLAHOMA COUNTY

s/ LINDA HOSTLER

Linda Hostler, Secretary

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

GENERAL MOTORS CORPORATION,
Appellant,
v.
OKLAHOMA COUNTY BOARD OF EQUALIZATION, GEORGE KEYES, COUNTY ASSESSOR OF OKLAHOMA COUNTY, and JOE B. BARNES, COUNTY TREASURER OF OKLAHOMA COUNTY,
Appellees,
and
JAN ERIC CARTWRIGHT, Attorney General of Oklahoma,
Defendant-Intervenor/ Appellee.

FILED
SUPREME COURT
STATE OF OKLAHOMA
OCT. 4, 1983
Ross N. Lillard, Jr.
CLERK

No. 58,438

ORDER DENYING PETITION FOR REHEARING ON OPINION AS AMENDED BY ORDER OF JULY 26, 1983

The Petition of Plaintiff-Appellant, General Motors Corporation, for Rehearing on Opinion as Amended by Order of July 26, 1983, is hereby denied.

IT IS FURTHER ORDERED that the Court will not entertain another petition for rehearing.

DONE BY ORDER OF THE SUPREME COURT in conference this 29th day of September, 1983.

s/ DON BARNES
CHIEF JUSTICE

THE ATTORNEY GENERAL
LARRY DERRYBERRY
STATE CAPITAL, OKLAHOMA CITY, OKLAHOMA 73105, TELEPHONE 405/521-2721

October 5, 1976

Mr. Phillip A. Hoffman, Manager
Special Tax Projects
General Motors Corporation
3044 W. Grand Boulevard
Detroit, Michigan 48202

Re: Opinion No. 69-156

Dear Mr. Hoffman:

I am in receipt of your recent request as to whether the state of the law expressed in the above-captioned opinion, a copy of which is attached, is still in force and effect.

I have reviewed said opinion and find the conclusion reached to be a correct analysis of the state of the law in Oklahoma. Since the date of issue of said opinion, I have found no case decisions or legislation that would alter the conclusion reached therein.

Accordingly, it is my opinion that the state of the law expressed in Opinion No. 69-156 is still in force and effect.

Yours very truly,

s/ LARRY DERRYBERRY
Larry Derryberry

LD: aw
Enclosure

LEASE

THIS LEASE, executed in duplicate as of this 1st day of April, 1978, by and between Oklahoma Industries Authority, an agency of the State of Oklahoma, hereinafter called "Lessor", and General Motors Corporation, a corporation organized and existing by virtue of the laws of the State of Delaware, duly qualified to do business in the State of Oklahoma, which corporate address is 3044 West Grand Boulevard, Detroit, Michigan 48202, hereinafter called "Lessee";

WITNESSETH:

Section 1. For and in consideration of the rents to be paid and the covenants and agreements to be performed on the part of Lessee, as are hereinafter set out, Lessor has demised and leased, and by these presents does demise and lease for the term, hereinafter set forth, unto the Lessee all of Lessor's interest in that certain tract and parcel of land situated in Oklahoma County, State of Oklahoma, and being more particularly described in Exhibit "A", which is an estate owned by Lessor severed from the surface and minerals in accordance with an Absolute Grant of Exclusive Right to Use from Lessee to Lessor of even date herewith, together with the improvements thereon, and the machinery and equipment of the Lessor located and to be installed therein, which machinery and equipment is described in accordance with "Exhibit 'B' to Lease Agreement" attached hereto on the date of the signing hereof and initialed by appropriate representatives of Lessor and Lessee.

• • •

Section 13. . . .

• • •

(d) The parties recognize that as the Lessor is an agency of the State of Oklahoma, the Project here de-

mised is not subject to ad valorem taxation under the Constitution and laws of the State of Oklahoma. . . .

• • •

IN WITNESS WHEREOF, Lessor and Lessee have duly executed and affixed their hands and seals to this Lease this 12th day of April, 1978.

OKLAHOMA INDUSTRIES AUTHORITY

By /s/ EDWARD L. GAYLORD

Chairman

ATTEST:

s/ HARRY BIRDWELL

Assistant Secretary

GENERAL MOTORS CORPORATION

By /s/ P. J. COLETTA

Vice President
P. J. Coletta
Vice President

ATTEST:

s/ MARGUERITE NOVELLI

Assistant Secretary
Marguerite Novelli
ASSISTANT SECRETARY

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA INDUSTRIES AUTHORITY, an agency of the State of Oklahoma, and GENERAL MOTORS CORPORATION, a corporation,
Plaintiffs,
v.
OKLAHOMA COUNTY EQUALIZATION BOARD and GEORGE C. KEYES, COUNTY ASSESSOR of Oklahoma County,
Defendants.

No. CJ-80-4524

PETITION

(APPEAL FROM BOARD OF EQUALIZATION OF OKLAHOMA COUNTY, OKLAHOMA)

Come now Oklahoma Industries Authority, an agency of the State of Oklahoma ("OIA") and General Motors Corporation, a Delaware corporation ("General Motors") pursuant to 68 O.S. 1971, § 2461 and appeal, in its entirety, the Order of Defendant, Board of Equalization of Oklahoma County, Oklahoma, ("the Board") entered September 17, 1980. By such Order the Board denied the protest filed by Plaintiffs on February 22, 1980, to the ad valorem assessment by Defendant Keyes against Plaintiff General

Motors of certain improvements located in Oklahoma County, Oklahoma.

• • •

10. Attorney General Opinion No. 79-168 is erroneous and the ad valorem assessment of the improvements used by General Motors pursuant to the contract between it and OIA violates the laws of Oklahoma and General Motors' rights under the Constitution of Oklahoma and the Constitution of the United States for the following reasons:

• • •

(c) Enforcement of Attorney General Opinion No. 79-168 or assessment of ad valorem taxes against General Motors on the improvements would constitute an unconstitutional impairment of the obligation of contracts in violation of Article II, Section 15 of the Consitution of Oklahoma and Article I, Section 10 of the Constitution of the United States.

• • •

(g) Enforcement of Opinion No. 79-168 would deprive plaintiff General Motors of due process of law in contravention of Amendments 5 and 14 of the Constitution of the United States.

• • •

WHEREFORE, Plaintiffs pray for judgment against Defendants declaring that the improvements as described in Exhibit E are not subject to ad valorem taxation for the year 1980 or for any other tax year prior to the expiration of the lease between General Motors and OIA; that the assessment thereof by Defendant Keyes be set aside and declared void and illegal; and that the Order of Defendant Board, dated September 17, 1980, be vacated.

Plaintiffs pray for all other further relief to which they may be entitled, and for their costs.

s/ JAMES D. FELLERS

JAMES D. FELLERS,
JOHN JOSEPH SNIDER,
MARGARET MCMORROW-LOVE, of
FELLERS, SNIDER,
BLANKENSHIP, BAILEY
& TIPPENS
2700 First National Center
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Attorneys for Oklahoma Industries Authority